# “Constitutional Paternalism” and the Inability to Legislate

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On 25 September 2019, the Italian Constitutional Court (ICC) has made clear that assisted suicide is not punishable under specific conditions. The judgment came one year after the ICC had ordered the Italian Parliament to legislate on the matter – which it did not do. The entire story is indicative of the inability of Parliaments to respond to social demands as well as the current trend of high courts to act as shepherds of parliaments rather than as guardians of the constitution.

## A case of strategic litigation

The constitutional question was raised by the case of Fabiano Antoniani, known as DJ Fabo, who was left quadriplegic and blind after a car accident in 2014. His physical conditions were extremely severe and deemed irreversible: he needed artificial support for nutrition and respiration and suffered from terrible pain and frequent convulsions and muscle spasms. His case and situation generated an intense public debate, reaching its apex when he decided to get assisted suicide in Switzerland where, unlike in Italy, it was legal under certain conditions. The politician Marco Cappato, a member of the radical party, drove him to a Swiss clinic where the assisted suicide was carried out and turned himself in to the police after he had returned to Italy. His self-reporting was aimed at opening a case for strategic litigation, with the objective of challenging the constitutionality of the criminal implication of his help to carry out the assisted suicide. His plan of strategic litigation succeeded, as Cappato was charged with the crime punishable under article 580 of the criminal code (“Helping someone to commit suicide, or to convince someone to commit suicide, is punishable with a sentence between 5 and 12 years”) before a Court in Milan submitted a question of constitutionality to the ICC. This provision was challenged on the ground of its constitutionality by the ordinary judge, who argued that this criminal regime violated the right to self-determination contained in art. 2 and art. 13 of the Italian constitution.

## A decision without a legal basis

In an unprecedented decision, and with no specific legal basis to adopt a decisional arrangement that resembles the German BVerfG’s *Unvereinbarkeitserklärung*, the ICC decided in October 2018 to suspend the proceedings and to accord the Parliament one year to provide for a much-needed comprehensive regulation of the matter. The Court, in a sort of interlocutory order, stated that “the current legal framework concerning the end of life deprives specific situations … of adequate protection” and gave the Parliament a one-year deadline to fill this legislative void. The ICC not only pushed the Parliament to legislate, but also provided some specific

guidelines. In fact, in its order, the ICC provided a rather detailed framework of factual conditions for the Parliament to consider in the desired intervention. In particular, the Court referred to a “scenario in which the assisted persons are (a) affected by an illness that is incurable and (b) causes physical or psychological suffering, which they find absolutely intolerable, and who are (c) kept alive by means of life support treatments, but remain (d) capable of making free and informed decisions”. In these cases, according to the Court, criminalizing assisted suicide had to be considered incompatible with the Constitution, also considering that in similar scenarios existing legislation might already allow patients to decide that death take its course. Under the recently approved Law no. 219 of 22 December 2017 (Provisions on informed consent and advance medical directives) patients may request the interruption of the ongoing life-sustaining treatment and concurrent subjection to heavy and constant sedation, with binding effect on third parties. In the case at hand, however, the patient rejected the interruption of life-sustaining treatment with simultaneous administration of heavy sedation because this solution would have led to even more unbearable and durable pain. Indeed, since the patient did not depend totally on a respirator, death would have occurred only after a considerable amount of time, quantifiable in days. In the view of the patient, this would have been an undignified way to end his life and his loved ones would have had to share in it on the emotional level.

However, in its order, the Court decided not to straightforward declare the unconstitutionality, but to leave the case pending for twelve months to offer the Parliament the possibility to intervene with a comprehensive regulation. In the Court’s view, in fact, a straightforward declaration of unconstitutionality would have left an ethically and socially sensitive area entirely unregulated and possibly open to abuse, such as amatorial and non-medical assistance to suicide and similar abuses. At the same time, the Court made clear that in the absence of legislative action, it would reconvene in September 2019 to decide on the pending case. Legislative inertia, however, is exactly what happened, with no significant steps having been put in place within the Parliament in the last year. Finally, the ICC found (or perhaps put) itself in the position of being forced to take a decision on the merits and it did so yesterday.

## “Waiting for the Parliament, the Court decides”

The full-text of yesterday’s judgment will be published in approximately one month but the published press release makes clear that it should not always be punishable to help someone “under intolerable physical or psychological suffering” to commit suicide. Anyone who “facilitates the suicidal intention … of a patient kept alive by life-support treatments and suffering from an irreversible pathology should not be punished under certain conditions”. The patient’s condition must be “causing physical and psychological suffering that he or she considers intolerable,” and the patient should be “capable of making free and informed decisions”, the press release reported. Moreover, the Court considered a new comprehensive regulation by the Parliament indispensable and subjected the non-punishability of assisted suicide to detailed conditions extracted from the existing legislation.

The matter of end-of-life choices always generates harshly controversial debates, and the decision of the ICC will certainly provoke strong reactions on both sides of those who support the introduction of a legislative framework leaving more space for self-determination and those who – on the contrary – support an interpretation of the right to life as all-encompassing. However, the precise consequences of the ICC's decision will be clear only after the publication of the full text of the court's decision and reasoning. In fact, the press release suggests that the legal reasoning of the Court will be rather complex and that the non-punishability of assisted suicide will be subject to articulated conditions.

Finally, it is far from clear who will be considered winner and loser in these legal proceedings at the end of the day – if these categories even apply. But there is one certain loser, namely the Italian Parliament. In fact, the Parliament was first pushed into the fray by a rather paternalistic move by the Constitutional Court. The latter not only decided that the Parliament should have taken a decision on the matter, but also drew quite detailed specifications for the needed regulation. After one year of inertia, the Constitutional Court of Italy went one step further by striking down the existing law and once again called on the Parliament: The ICC's press release is tellingly titled: "Waiting for the Parliament, the Court decides". This paternalistic trend curiously emerges in many recent developments involving the relations between high judicial authorities and Parliaments: Brexit is a quintessential example of this troubled relation, but also the *BVerfG's* protection of the *Bundestag's* powers before the (by the Bundestag itself ratified and agreed upon) transfers of competences to a supranational level, or recent developments in Israel are part of this common pattern. Courts are increasingly acting as shepherd of Parliaments rather than as guardians of the Constitution. The present case is an extreme example of this trend as, unlike in similar stories, the Parliament was not to be saved from any external threat, typically coming from the abuse of executive powers. This paternalistic attitude emphasizes the growing inability of Parliaments to respond to social demands.

In conclusion, this paternalistic approach seems very unlikely to provide for any efficient treatment of the various diseases affecting Parliaments in contemporary constitutional systems and – on the contrary – ends up helping their suicidal plans. The point is that it is far from certain that there is any life for liberal-democratic constitutionalism after the death of Parliaments.

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